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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-223

CENTRAL HARDWARE COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD

and

RETAIL CLERKS UNION, LOCAL 725, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RETAIL CLERKS UNION, LOCAL 725, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

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BRIEF FOR RETAIL CLERKS UNION, LOCAL 725, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

QUESTION PRESENTED

Whether an employer abridges the right of employees to self-organization guaranteed by section 7 of the National Labor Relations Act by barring non-employee union representatives from soliciting employees to join the union on its retail store parking lot open to the public.

STATEMENT

A. The Company's Unfair Labor Practices

Central Hardware Company (the Company) operates a chain of retail hardware stores (A. 18-19; 7, 13, co. br. p. 3 and note).[1] It has two stores, known as the East Store and the West Store, in Indianapolis, Indiana; it took possession of these stores on April 15, 1968, and opened for business on June 3, 1968 (A. 19, 24). In the interim it hired employees and prepared for opening (A. 24). Retail Clerks Union, Local 725, Retail Clerks International Association, AFL-CIO, (the Union) began an organizational campaign among the employees of the Indianapolis stores in the latter part of May 1968 (A. 26). In the course of the organizational campaign, as the National Labor Relations Board found and the Court of Appeals agreed, the Company engaged in the following four unfair labor practices:

1. On June 13, 1968, the Company announced, and thereafter continued in effect, a rule directed to employees mandating that "no solicitation may be made on company premises for any purposes without prior management approval. Violations . . . will result in disciplinary action including the possibility of dismissal" (A. 21, n. 11, 29-30). This rule, privileged in its application within the selling areas of the stores, is impermissibly overbroad because it also prohibits solicitation of union membership by employees "off . . . selling floors during their nonworking time", in places

[1] Wherever, in a series of references, a semicolon appears, the references preceding the semicolon are to the findings and the references following the semicolon are to the supporting evidence. Where no semicolon appears, references to pages 17-74 are to the findings, and references to pages 91-259 are to the evidence.

such as the employees' lunchroom, lockerrooms, storage areas, and parking lots (A. 33-34, 78-80). The Company was ordered to desist from "[p]romulgating, maintaining, [or] enforcing . . . any rule prohibiting any employee from soliciting any other employee on behalf of . . . [the Union], or any other labor organization, in nonselling or nonworking areas of its retail stores during the nonworking time of both," and to "[r]evoke and withdraw" any such rule (A. 56-57, 58, 70, *infra*, pp. 1a, 3a).

2. The Company interrogated employees Larry Stuck and Marilyn Ragle concerning the delivery of a union authorization card by Ragle to Stuck within the West Store, and laid off Ragle for three days to punish her for violating the "no-solicitation" rule. The "Notice of Disciplinary Action" given to Ragle "record[s] that [she] has violated the Company's 'no-solicitation' rule; and is hereby given a disciplinary layoff of three (3) days, and a warning that future violation of the rule will result in immediate discharge without further notice." (A. 30-31, 78-80.) The Board noted that "a discriminatory deprivation of employment, as in Ragle's case, . . . 'goes to the very heart of the Act' " (A. 49, n. 44). The Company was ordered to desist from "interrogating any employee concerning . . . or . . . disciplining any employee for failure to comply with" the invalid no-solicitation rule, and to make whole Ragle for any loss of earnings she sustained because of her three-day layoff (A. 56-57, 58, 70, *infra*, pp. 1a-2a, 3a).

3. While promulgating and enforcing an invalid no-solicitation rule prohibiting prounion campaigning by employees, the Company permitted the circulation and signing of an antiunion petition on working time

(A. 66-67). Based on the finding that it had thereby engaged in "disparate and discriminatory enforcement of the invalid no-solicitation rule" (A. 67, 79), the Company was ordered to desist from "[e]nforcing in a discriminatory manner any rule pertaining to union activities on company time" (A. 71, *infra*, p. 2a).

4. In mid-July 1968, the Company promulgated, and continues in force, a no-solicitation rule directed to nonemployee representatives of the Union providing that "management [will] keep all union organizers off our premises, both inside and outside." The "main thrust" of the rule "is to prevent nonemployee union organizers from soliciting on behalf of the Union on . . . [the Company's] parking lots. To this end, . . . [the Company's] officials, since July 22, have asked union representatives to leave its lots." (A. 36, 21, n. 11.) The rule was held invalid insofar as it prohibits "nonemployee representatives of the Union from appearing on parking lots maintained by . . . [the Company] adjacent to its retail stores and there soliciting employees on behalf of the Union . . ." (A. 55, 80-85). The Company was ordered to desist from (A. 57, 70, *infra*, p. 2a):

> Promulgating, maintaining, or enforcing any rule prohibiting nonemployee representatives of . . . [the Union], or any other labor organization, from appearing on the parking lots adjacent to its retail stores and there soliciting employees on behalf of . . . [the Union], or any other labor organization.

Correlatively, the Company was ordered to "[r]evoke and withdraw" any such rule (A. 58, 70, *infra*, p. 3a).

The question before this Court pertains to the validity of the Company's bar of nonemployee union representatives from soliciting union membership on the

Company's parking lots. We therefore now summarize the particular circumstances pertinent to that unfair labor practice.

B. The Physical Layout of the Areas Surrounding the Indianapolis Stores.

The Company operates its two Indianapolis stores on off-street enclaves in outlying areas of the city (A. 21; 109-111, 238-239, 125-126, 241). The West Store is located near the intersection of West 38th Street and Lafayette Road (A. 21; 109-111, 238, 92). The East Store is situated near the intersection of East 38th Street and Shadeland Avenue (A. 21; 109-111, 239). These streets are busy public highways along which traffic moves at fairly high rates of speed (A. 22 and ns. 12, 13; 111-12, 117, 119, 170-181, 244-250). There are no sidewalks adjacent to them (A. 22; 112, 117-118).

Each store fronts on a paved parking lot. The lots separate the stores from the streets. The distances from the lot openings on the streets to the store entrances range from a minimum of 260 feet to a maximum of 1,000 feet. (A. 22-23; 119-120, 109-111, 238-239.) Each lot accommodates about 350 cars (A. 23; 228). The West Store "property is approximately five acres with a 66,000 square foot retail store . . . located thereon . . ." (A. 227-228). This is typical. The Company's criteria in establishing a store is to have "the building be the approximate size of a minimum of 50,000 square feet . . . to 70,000 square feet," situated "as a free-standing unit", by which the Company means a store "that stands by itself, that is not adjacent to, or contiguous to, or depends upon traffic that is pulled by any other establishment" (A. 221).[2]

[2] The Company, of course, locates its stores in heavily trafficked areas in order to attract the trade of the travelling public (A. 119).

Entrance to and exit from the West Store is from one point on West 38th Street and two points on Lafayette Road (A. 24; 109-111, 238, 113, 114-115). Entrance to and exit from the East Store is from three points on Shadeland Avenue directly in front of the parking lot, and by an access road opening on East 38th Street and running to the parking lot (A. 24; 109-111, 239, 118-119). The only stop sign at any driveway is at the point where the access road enters onto East 38th Street (A. 202). At the East Store there are two level and grassy islands which separate the three access points on Shadeland Avenue at which persons may safely stand (A. 24; 118, 206-207).

At the West Store, the straight-line distances separating the parking lot entrances from the store entrance are 425 feet measuring from the West 38th Street access point, and 450 feet and 475 feet measuring from the two Lafayette Road access points (A. 238, 109-110). At the East Store the straight-line distances separating the parking lot entrances from the store entrance measuring from the three access points on Shadeland Avenue are 260, 280, and 320 feet, and from the access road on 38th Street 1,000 feet (A. 239, 110).

There are no fences or gates around the Company's parking lots, nor does the Company station guards there for the purpose of refusing their use to anyone. There are no signs barring trespassers from the lots. (A. 23; 113-114, 115, 124.)

The enclaves in which the Company's Indianapolis stores are located contain other business enterprises (A. 23). At the West Store, on the West 38th Street side, there is a McDonald's (a hamburger place), and on the Lafayette Road side, there is a loan company, a carpet store, a pizza inn, and a gift shop (A. 23; 112-

113, 121). The Company itself proposes to operate a tire service center located next to the loan company (A. 121). In addition, across the streets from the West Store enclave, there is a Burger Chef, a shopping center and a Shell service station (A. 193).

At the East Store enclave, there is on one side of the Company's store a truck stop which operates a service station and a grill (A. 23; 118, 129, 167). On the other side there is a car wash, and an office building housing a construction company and a warehouse. (A. 23; 121-122). The Company is also constructing an auto tire service store at this site (A. 122). In addition, across the streets from the East Store enclave there is a restaurant and a small shopping center (A. 193-194).

At each enclave the same entrances-exits connecting the public streets and the parking lots serve both the Company's stores and the other businesses located there (A. 23-24). There is no sign at the parking lot of either of the Company's stores which states that the lot is reserved for use by customers of the Company (A. 23; 124, 115). At the West Store enclave, the sole entrance-exist on West 38th Street which serves the Company's store also serves McDonald's, and persons wishing to go to McDonald's must traverse the Company's parking lot in order to get to McDonald's parking lot (A. 112-113, 127). Persons may park on the Company's lot and walk from there to McDonald's, the loan company, or elsewhere within the enclave to patronize those places (A. 122-123). The parking lot which serves the loan company, carpet store, pizza inn, and gift shop, known as Fashion Square, is contiguous with the Company's parking lot and together they form a single uninterrupted open area (A. 123-124, 109-111, 238). A motorist can enter the Company's

parking lot at the West 38th Street access point and drive in an unobstructed manner through that lot onto the parking lot of the other establishments and leave the enclave at the access points nearest that lot; or the traffic flow can be reversed, entering the enclave at the access points nearest the lot of the other establishments, passing through that lot onto the Company's lot and leaving the enclave at the access point nearest that lot (A. 124). Persons can park on the lot of the other establishments and walk from there to shop at the Company's store (A. 123). At the East Store enclave, persons can enter and leave the Company's parking lot through the access road which serves other establishments (A. 128-129), and by way of the truck stop property as well (A. 118).[3]

C. The Company's Operations and the Situation of Its Employees in Relation to It

The Company's stores operate on a self-service basis (A. 22; 130, 231). The main function of employees in the sales areas is to assist customers in the selection of merchandise on display and to mark items for sale (A. 22; 129, 130). Customers select the goods they want, take them in carts or baskets to check-out lanes located near the store's front entrances, and the transaction is completed by the employees manning the check-out lanes (A. 22; 107-108, 130, 231). The Company boasts that it will "achieve the distinction of being 'The Store' for hard goods purchasing in the City of Indianapolis" (A. 233).

About 125 employees work at each store (A. 24; 116, 120). The employees wear a name tag and distinctive

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[3] Accordingly, the statement in the Company's brief that "the use of . . . [its] lot[s] is limited to Central's invited customers" (br. p. 4) is quite inaccurate.

orange-colored vests or smocks (A. 25; 95, 165, 192). Full-time employees work two shifts, 8:30 a.m. to 5:00 or 6:00 p.m., and 1:00 p.m. to 10:00 p.m.; part-time employees come in at all times and apparently work a four-hour shift (A. 194-195). Employees may leave the store at lunch time or break time, and employees may eat their lunch on the parking lot (A. 116-117, 149, 168-169).

Except for a handful who walk to work, the employees drive or car-pool to work (A. 24; 115-116, 207). They arrive by and leave from any entrance-exit point which is convenient to them (A. 25; 129, 199, 200, 203). They are required to park their cars in certain designated areas of the Company's parking lots, generally at the side of the store (A. 24-25; 126, 128).

Most of the employees live in various sections of Indianapolis, a city whose population exceeds 476,000 (A. 24; 182, 251, 240, 125). About fifty employees live in surrounding towns (A. 24 and n. 5; 240, 125, 103). Employees live upwards of twenty miles from the store; about 57 percent live within five miles of the store and about 75 percent within ten miles (A. 24; 98-99, 120, 135-136). A number of employees who live outside Indianapolis have rural route addresses (A. 24; 103). These do not locate the employee geographically and are difficult to find (A. 24; 103, 187).

D. The Union's Organizational Campaign and the Company's Promulgation of Its No-Solicitation Rules Barring Employees From Soliciting Union Membership at Any Time on Company Premises and Barring Nonemployee Union Representatives From Its Parking Lots.

The Union started its organizational campaign among the Company's employees about May 21, 1968 at the West Store and about a week later at the East

Store (A. 26; 192). The employees were asked to sign cards authorizing the Union to represent them (A. 26; 192). The Union's representatives spoke to the employees on the parking lots at the beginning and the end of the day and during their lunch period and free time (A. 26; 192, 196). Employees who favored the Union talked to their fellow-employees in the stores and also on the parking lots (A. 26; 156, 159-160).

After the first two or three weeks of the campaign the Union representatives began visiting the residences of employees and there sought to convince those whom they found at home of the benefits of unionization (A. 26; 92). One representative of the Union made 50 to 60 home calls, at distances from the stores up to 15 or 16 miles, but found only 7 or 10 employees at home (A. 27; 98-99, 102-103). This conforms with the Union's general experience that a union representative making a "home call . . . may have to go back on an average . . . [of] five to six times in order to actually make contact with the person" sought (A. 27; 185).

On June 13, 1968, the Company promulgated, and thereafter continued in effect, a rule directed to its employees mandating that "no solicitation may be made on company premises for any purposes without prior management approval. Violations . . . will result in disciplinary action including the possibility of dismissal" (A. 21, n. 11, 29-30; 132-133, 234, 100, 150-151, 152, 156). The rule was first announced by the Company's vice-president in speeches delivered to the employees on June 13, 1968, in which he stated that the rule embodies "long standing policy . . . [,] is quite broad and applies to any . . . union solicitations" (A. 29-30; 121, 132-133, 150-151, 152, 234). The rule was also posted within the store on a bulletin board at the

time clock (A. 142-143, 108-109). Employees were interrogated concerning their compliance with the rule, and one employee was laid off for three days as punishment for violating the rule (A. 30-31; 104-106, 132, 142-149, 152-156, 181, 223-227, 228, 229, 243). Nevertheless, the Company permitted the circulation and signing of an antiunion petition on working time (A. 66-67; 138-141, 242).

About a month after the Company adopted its employee no-solicitation rule it promulgated another no-solicitation rule, this time directed at nonemployee representatives of the Union (A. 36). In a letter dated July 15, 1968, distributed to the employees four or five days later, the Company's president stated that instructions had been given to "our Indianapolis management to keep all union organizers off our premises, both inside and outside" (A. 36; 108, 237, 133, 223). Since July 22, the Company has asked union representatives to leave its lots (A. 36; 93, 101, 106, 165-168). The rule continues in force (*ibid.*). Its "main thrust is to prevent nonemployee union organizers from soliciting on behalf of the Union on . . . [the Company's] parking lots" (A. 36).

At the inception of the organizational campaign the Union did not have a list of the employees' names and addresses (A. 195). By about July 22, 1968, the Union had compiled a list which it estimated to be about 80 percent complete (A. 26; 196, 99). The information came primarily from conversations with the employees on the parking lots (A. 195-196, 187). Names and addresses were also received from prounion employees within the store who obtained the information in talks with their fellow-employees (A. 161, 170, 204-205). Finally, names and addresses may be obtained from

the motor vehicle department by giving it the license numbers of employees' cars which are gotten by copying down the number while the car is parked on the Company's lot (A. 187-189, 205).

Following the Company's debarment of the Union's representatives from the parking lots, the currency of the list of names and addresses even at the 80 percent level of completeness dissipated (A. 197). "It dissipated because we were not allowed . . . on the parking lot, to have access . . . to the employees, new employees that they hired in, and the old employees . . . quitting. As long as we had access, and knew an employee, recognized the face, name tag, or something, we could ask his name and address. When this . . . ceased, then we could not complete—keep an up-to-date record" (A. 197-198). The Union offered to prove that "approximately 120 employees . . . who were on . . . [its] list . . . left their employment in . . . the first three months of the campaign" (Tr. 696[4]).

E. The Need for Access to the Company's Parking Lots in Order for the Union To Reach the Employees With Its Organizing Message.

The Board found that "there are no reasonable means available to nonemployee representatives of the Union to reach . . . [the Company's] employees with its organizing message other than by having those representatives meet them on . . . [the Company's] parking lots" (A. 29).

1. Home calls alone are inadequate (A. 26-27). There is substantial difficulty in finding the homes of employees who live in rural areas surrounding Indian-

[4] "Tr." refers to the original transcript of record not reproduced in the printed Appendix.

apolis (A. 27; *supra,* p. 9). Furthermore, the employees are absent more often than not when the Union's representatives call (A. 27), the ratio being five or six attempted visits for each time the employee is actually found at home (*supra,* p. 10). Finally, home calls depend on having the employee's name and address, and access to the parking lot is essential to obtain this information (*supra,* p. 11).

2. Communicating with the employees at the entrances-exits through which they enter and leave the enclave by automobile on going to and from work is not feasible (A. 27-28). Of the eight access points to both stores—three at the West Store (*supra,* p. 6) and five at the East store (*supra,* pp. 6, 8)—the only safe places to stand are at the three access points on Shadeland Avenue at the East Store (A. 27, 24; *supra,* p. 6). Furthermore, in order to communicate at the access points, the union representatives would be required to determine which of the several entry or exit points would be used by the employees, who could choose any (*supra,* p. 9), and to be able to distinguish the cars in which the employees ride from those of other people driving through those points in time to stop the employees' cars, which would be difficult if at all possible (A. 27; 194, 199, 201, 202, 208-209). Finally, communication at these points would result in traffic congestion, with lines of automobiles backing up into the parking lots on leaving from work and traffic tie-ups on the surrounding roads on arrival to work (A. 28; 199, 201, 202).

3. Newspaper, radio, and television advertising is not feasible (A. 28). In the Indianapolis area, there are two newspapers of general circulation in which the Company advertises its products, forty so-called

neighborhood newspapers, four television stations, and fifteen radio stations (A. 25, 28; 190-192, 251-256). Were the Union to attempt to communicate with Company's employees through these channels, it would have a problem in deciding on the appropriate stations and newspapers, and would not be able to reach the employees effectively by these means (A. 28; 189-190). Furthermore, the cost is high, and for this additional reason the Union did not use these media in its organizational campaign (A. 28; 190).

4. Finally, meetings on the streets are not feasible (A. 28-29). Indianapolis is a substantial metropolitan community (A. 28; *supra,* p. 9). The employees live in various sections of Indianapolis and its surrounding towns (A. 28-29; *supra,* p. 9). Accordingly, it is quite unlikely that representatives of the Union would, or could be expected to, meet any significant number of the Company's employees on the streets (A. 29).

F. The Conclusion of the Board and the Court of Appeals on the Company's Debarment of Nonemployee Union Representatives From the Company's Parking Lots.

The NLRB Trial Examiner found that "[b]y promulgating, maintaining, and enforcing a rule prohibiting nonemployee representatives of the Union from appearing on parking lots maintained by . . . [the Company] adjacent to its retail stores and there soliciting employees on behalf of the Union . . . [the Company] has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act" (A. 55). He first observed that the Company's stores are located in a business complex containing other retail establishments, but that it did not matter whether this complex is or is not considered a shopping center, for no legal distinction can be drawn

between a single store parking lot and a shopping center parking lot (A. 23, n. 15, A. 42, n. 38). He then concluded that the Company's debarment of the Union's representatives from its parking lots was an unfair labor practice on independent and alternative grounds. First, the Company's parking lots are quasi-public in character, and therefore access to them may not be prohibited even if alternative means of reaching the employees are reasonably available (A. 42-43):

> [The relevant inquiry] is whether the parking lot in question, although privately owned, is quasi-public in character. If that is the fact, the owner of the lot may not prevent nonemployee agents of a union from communicating with his employees on the lot even though they may be otherwise reasonably available to receive the union's message.
>
> The parking lots here . . . are accessible to the public without limitation. . . . [T]he parking lots are unfenced, unguarded, and there are no posted signs barring anyone from the lots.
>
> Accordingly, . . . [the] Company's lots have a quasi-public status. This being so, . . . [the Company's] rule excluding nonemployee representatives of the Union from its parking lots is invalid.

Alternatively, disregarding the quasi-public status of the parking lots, the Trial Examiner concluded that there are, in any event, "no reasonable means available to nonemployee representatives of the Union to reach . . . [the Company's] employees with its organizing message other than by having those representatives meet them on . . . [the Company's] parking lots" (A. 29). The Board adopted the Trial Examiner's conclusion (A. 68 and n. 2).

The Court of Appeals affirmed (A. 80-85). The essential inquiry, it concluded, goes "to the use of the

properties in question" (A. 84). "The Board here found Central Hardware's parking lots to be generally open to the public, to have 'a quasi-public status' ", and this finding, having adequate evidentiary support, "binds us upon our review" (A. 84). The Court of Appeals accordingly held that "the Company's non-employee no-solicitation rule to be overly broad as applied to its parking lots. Thus, we sustain the Board's determination that the Company's enforcement of this rule against the Union constituted an unfair labor practice in violation of § 8(a)(1) of the Act" (A. 84-85).

SUMMARY OF ARGUMENT

I

Section 7 of the National Labor Relations Act guarantees to employees, and Section 8(a)(1) safeguards from infringement by employers, the right of self-organization and collective bargaining. That right "is a complex whole, embracing the various elements of meetings, speeches, peaceful picketing, the printing and distribution of pamphlets, news and argument, all of which, however, are traceable to the fundamental liberties of expression and assembly. So compounded, the right of self-organization and collective bargaining is fundamental, being one phase of the process of free association essential to the democratic way of life." S. Rep. No. 1150, 77th Cong., 2d Sess., Part 1, 4-5. Congress in Section 7 has given statutory expression and enhanced scope to the values which the First Amendment enshrines.

The First Amendment and Section 7 both protect the reciprocal right of unorganized employees and union adherents to "be informed" and to "inform"

concerning the benefits of union representation. *Thomas* v. *Collins*, 323 U.S. 516, 533-534 (1945). The premise of each command is that the means and media of communication must be kept free and open to fulfill the right to "be informed" and to "inform." To this end a bare interest in private property must yield to the superior demands of untrammeled speech. " 'Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.' " *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308, 324 (1968).

Section 7 guaranties and First Amendment rights thus coalesce. There is, however, an important difference between the First Amendment and Section 7 as the source of right. The First Amendment operates by its own force and requires this Court's independent judgment as to the scope of the constitutional command. Section 7 embodies Congress' judgment as to the appropriate reach of the values expressed by the First Amendment and requires this Court simply to give unstinted effect to the legislative judgment. This Court's determination of the reach of the means that Congress adopted to implement the First Amendment is not a judicial commitment to the reach of the First Amendment operating by its own force unaided by legislative support. Legislative latitude to enforce and enlarge a constitutional right may of course be broader than the independent command that the right expresses by its bare terms. Accordingly, while the reach of the First Amendment operating by its own force does fix the minimum meaning of Section 7, the interpretation of Section 7 beyond this inner core is

a judgment of the will of Congress in giving expanded legislative scope to the values which the constitutional right serves. Viewed in this light, the course of judicial inquiry in this case should be marked by hospitality in fleshing out the scope of the statute, not by the restraint evocable by unalloyed constitutional adjudication.

II

In *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U.S. 308 (1968), this Court barred as a violation of the First Amendment state exclusion of nonemployees from a shopping center to publicize the disfavored labor policy of a store by picketing and handbilling at the store within the center. The teaching of *Logan Valley* provides the premise for the interpretation of Section 7 in this case. Its rationale is clear. An employer who opens his property to the public—to customers in order to secure their patronage and to others in the community in order to operate his store—cannot close his property to peaceful picketing in the immediate vicinity of the store to publicize the store's disfavored labor policy.

Logan Valley is this case. The property is as open in this case as it was in *Logan Valley.* Persuasion to union membership in this case is surely as much a protected exercise of free speech as the peaceful picketing in *Logan Valley.* But, it is said, it makes a difference that (1) here the Company's stores are not located within a shopping center, and that (2) here the Union sought to persuade employees to acquire union membership, rather than to dissuade customers from patronizing a nonunion store by picketing its premises. Analysis of these differences confirms the absence of a tenable distinction.

The Company asserts that it operates a so-called free-standing store. The definition of a free-standing store is that it is surrounded by a huge parking lot. That lot creates precisely the *cordon sanitaire* which *Logan Valley* holds cannot be interposed as a barrier to communication. 391 U.S. at 324-325. There is no sensible basis for asserting that a storekeeper who occupies a severable parcel of land may enjoy the immunity of a parking lot *cordon sanitaire* while a storekeeper who operates within a shopping center may not.

Furthermore, the Company's stores do not stand alone but are located within an enclave which the Company shares with other business establishments. The same entrances-exits to the enclave serve both the Company's stores and other businesses located there, and movement within the enclave and access to it are free, open, and unobstructed. To a realtor the Company may nevertheless still be operating "a single, free-standing store," but his commercial definitions are hardly relevant to ascertaining whether property has been opened to public entry for free speech purposes. The only viable standard is the openness of the property, not whether it is a part of a free-standing store, a shopping center, or some other commercial complex. The Company's stores easily pass the relevant test.

Nor can there be any sensible basis for a claim that conversations to persuade employees to join a union have lesser protection as speech than peaceful picketing to dissuade customers from patronizing a nonunion store. If there is any primacy between the two, it belongs to the pure speech of oral communication, rather than to peaceful picketing which inherently admixes verbal and nonverbal elements. Furthermore,

it can make no difference that the conversations here were addressed to the employees while the picketing in *Logan Valley* was directed at customers. The First Amendment and Section 7 are hardly less solicitous of communication with employees than with customers. And the exterior store grounds are as much the natural and effective place to reach the employees in this case as they were to reach the customers in *Logan Valley*. Each area is equally an appropriate place to disseminate information regardless of whether the means of communication are picketing, handbilling, or solicitation of union membership by talking.

III

In *N.L.R.B.* v. *Babcock & Wilcox*, 351 U.S. 105, 112 (1956), this Court stated that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." This standard is not relevant to property opened to public entry, and if relevant has been met.

First, the short and decisive distinction is that, unlike the property in this case, "the Babcock & Wilcox parking lot was not generally open to the public."[5] The public use to which the opened property is put is pivotal. *Second*, a ban of speech on property opened to the public inherently implicates precisely that dis-

[5] *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31*, 61 Cal.2d 766, 394 P.2d 921, 926 (1964), cert. denied, 380 U.S. 906 (1965), cited with approval in *Logan Valley*, 391 U.S. at 325, n. 15.

crimination which the *Babcock & Wilcox* standard forbids. To permit entry to the property of every element of the public with any store-related reason for presence on the premises except that part of the community with a labor message germane to the store's operation to which the storekeeper objects is invidious. This basis of exclusion makes the exercise of free speech the point of distinction in determining what part of the public to bar from property otherwise generally open. *Third,* the Board's undisturbed finding is that "there is no reasonable means available to nonemployee representatives of the Union to reach . . . [the Company's] employees with its organizing message other than by having those representatives meet them on . . . [the Company's] parking lots." (A. 29, 68, n. 2). This finding of course precisely fits the basis for allowable entry onto the property in accordance with the *Babcock & Wilcox* standard.

IV

In the end this case reduces to the same equation that the Court resolved in *Logan Valley.* On the one side there is nothing but "[n]aked title" to property. 391 U.S. at 324. On the other side is the substantial hinderance to "the communication of ideas" resulting from exclusion from the property. *Id.* at 323. *Logan Valley* means that "the paramount and preferred place given to . . . freedom of speech in our democratic system . . . should be accorded precedence over the mere 'naked title' . . . of [a] market owner['s] . . . interest in the premises."[6] Regress from this teaching would be retreat from the First Amendment. It would be heedless of Congress' will expressed in its hospitable incor-

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[6] *In re Lane,* 71 Cal.2d 872, 457 P.2d 561, 565 (1969).

poration and protection of free speech values in section 7 of the National Labor Relations Act.

ARGUMENT

SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT REQUIRES THAT NONEMPLOYEE UNION REPRESENTATIVES HAVE ACCESS TO STORE PARKING LOTS OPEN TO THE PUBLIC TO SOLICIT THE UNION MEMBERSHIP OF THE STORE'S EMPLOYEES PRESENT ON THE LOTS.

We shall show that, (1) Congress in Section 7 of the National Labor Relations Act has given statutory expression and enhanced scope to the values which the First Amendment enshrines, (2) this Court's decision in *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U.S. 308 (1968), provides the premise for the interpretation of Section 7, and following its teaching Section 7 requires that nonemployee union representatives be allowed to solicit union membership on the Company's parking lots which have been opened to the public, and (3) this Court's earlier decision in *N.L.R.B.* v. *Babcock & Wilcox,* 351 U.S. 105 (1956), is not relevant to property opened to the public, and if relevant its standard has been satisfied.

1. CONGRESS IN SECTIONS 7 AND 8(a)(1) OF THE NATIONAL LABOR RELATIONS ACT IMPLEMENTED FIRST AMENDMENT RIGHTS BY BARRING EMPLOYER INTRUSION UPON FREE AND OPEN COMMUNICATION IN THE AREA OF SELF-ORGANIZATION.

Section 7 of the National Labor Relations Act provides in part that: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Section 8(a)(1) protects these rights from employer abridg-

ment by making it "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . ."

Congress in Section 7 has given statutory expression and enhanced scope to the values which the First Amendment enshrines. As stated in the Senate Report on Violations of Free Speech and Rights of Labor (S. Rep. No. 1150, 77th Cong., 2d Sess., Part 1, 4-5):

> The right of self-organization and collective bargaining is a complex whole, embracing the various elements of meetings, speeches, peaceful picketing, the printing and distribution of pamphlets, news and argument, all of which, however, are traceable to the fundamental liberties of expression and assembly. So compounded, the right of self-organization and collective bargaining is fundamental, being one phase of the process of free association essential to the democratic way of life.

Section 7 guaranties and First Amendment rights thus coalesce at their inner reach. "Those guaranties include the workers' right to organize freely for collective bargaining. And this comprehends whatever may be appropriate and lawful to accomplish and maintain such organization. It include[s] . . . the right to designate . . . any . . . union or agency as the employees' representative. It include[s] . . . their right fully and freely to discuss and be informed concerning this choice, privately or in public assembly. Necessarily correlative . . . [is] the right of the union, its members and officials, whether residents or nonresidents . . ., and if the latter, whether there for a single occasion or sojourning longer, to discuss with and inform the employees concerning matters involved in their choice. These rights of assembly and discussion are protected

by the First Amendment." *Thomas* v. *Collins,* 323 U.S. 516, 533-534 (1945). The reciprocal right to "be informed" and to "inform" expresses the dual interest of the speaker and hearer in communicating with each other. When the speaker is silenced, the listener is also injured.

The premise of section 7, as it is of the First Amendment, is that the means and media of communication must be kept free and open in order to fulfill the right to "be informed" and to "inform." To this end a bare interest in private property must yield to the superior demands of untrammeled speech. First Amendment rights do not knuckle to the "claimed absolute right" of storekeepers "under state law to prohibit any use of their property by others without their consent." *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U.S. 308, 324 (1968). Neither do Section 7 rights. It is the function of the NLRB in the enforcement of Section 7 rights to keep the channels of communication open and unobstructed, and in the discharge of that function appropriate access to property in order to reach the audience cannot "be defeated through the simple assertion . . . of a landlord's interest." *Harlan Fuel Co.,* 8 NLRB 25, 32 (1938). The propriety of labor activity on private property has been a persistent issue in disputes before the NLRB and its resolution " 'belongs to the usual administrative routine' of the Board."[7] In a variety of contexts private property has been subordinated to the statutory guaranty of protected concert.[8] "We have long

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[7] *N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111, 130 (1944).

[8] In enforcing an NLRB order directing the employer to permit the union to conduct an independent time study within the plant, the Court of Appeals for the Second Circuit stated that: "Nor are we persuaded that the Board's decision unduly invaded the Com-

passed the point where the bundle of property rights can be used arbitrarily or capriciously to restrict a worker's freedom of association or expression."[9] The short of it is that, with Section 7 rights no less than with First Amendment rights, " 'Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.' " *Logan Valley,* 391 U.S. at 325, quoting from *Marsh* v. *Alabama,* 326 U.S. 501, 505-506 (1946).

The attempt of the Company and its *amicus* to distinguish between *Logan Valley* and this case on the ground that the former rests on First Amendment rights and the latter on Section 7 rights is therefore sleeveless (co. br. pp. 13-15; ARF br. pp. 2-3). Had the Company obtained an injunction barring the union representatives from the parking lots, or had the rep-

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pany's property rights. In other circumstances, the courts have not hesitated to afford union representatives access to company premises in furtherance of the Act's purposes. See *N.L.R.B.* v. *Stowe Spinning Co.,* 336 U.S. 226 (1946) (union granted access to company town to hold organizational meeting); *N.L.R.B.* v. *Lake Superior Corp.,* 167 F. 2d 147 (6th Cir. 1948) (union granted access to company-owned logging camp to solicit membership); *N.L.R.B.* v. *Cities Service Oil Co.,* 122 F. 2d 149 (2d Cir. 1941) (union granted access to company ship to discuss grievances with unlicensed personnel)." *Fafnir Bearing Co.* v. *N.L.R.B.,* 362 F.2d 716, 722 (C.A. 2, 1966). See also, *Interlake S.S. Co.,* 174 NLRB No. 55, 70 LRRM 1177; 178 NLRB No. 20, 72 LRRM 1008 (1969) (access by union organizers to ship while crew is in port to solicit union adherence).

[9] *N.L.R.B.* v. *United Aircraft Corp.,* 324 F. 2d 128, 131 (C.A. 2, 1963), cert. denied, 376 U.S. 951 (1964). See also, *N.L.R.B.* v. *S & H Grossinger's, Inc.,* 372 F. 2d 26, 29-30 (C.A. 2, 1967), enforcing as modified, 156 NLRB 233, 247-265 (1965).

resentatives been convicted of violation of a state trespass statute, the First Amendment would have been at the forefront of the source of right protecting against that action. By force of section 7's statutory encasement of First Amendment freedoms the First Amendment remains at the forefront when an employer by his own unaided self-help excludes the representatives from the parking lots. Indeed, in this case, the Company sought police assistance to bar a union representative from its parking lots (A. 166-168), so that state and private action are interlaced and Section 7 and First Amendment protections entwined. "Section 7 confers the right of choice generally on employees and not merely as against the employer." Chief Justice Stone concurring in *Hill* v. *Florida,* 325 U.S. 538, 545 (1945).

There is, however, an important difference between the First Amendment and Section 7 as the source of right. The First Amendment operates by its own force and requires this Court's independent judgment as to the scope of the constitutional command. Section 7 embodies Congress' judgment as to the appropriate reach of the values expressed by the First Amendment and requires this Court simply to give unstinted effect to the legislative judgment. This Court's determination of the reach of the means that Congress adopted to implement the First Amendment is not a judicial commitment to the reach of the First Amendment operating by its own force unaided by legislative support. Legislative latitude to enforce and enlarge a constitutional right may of course be broader than the independent command that the right expresses by its bare terms. Accordingly, while the reach of the First Amendment operating by its own force does fix the minimum meaning of Section 7, the interpretation of Section 7 beyond this inner core is a

judgment of the will of Congress in giving expanded legislative scope to the values which the constitutional right serves. Viewed in this light, the course of judicial inquiry in this case should be marked by hospitality in fleshing out the scope of the statute, not by the restraint evocable by unalloyed constitutional adjudication.[10]

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[10] See, *United States* v. *Guest*, 383 U.S. 745, 762, 781-784 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Jones* v. *Alfred H. Mayer*, 392 U.S. 409, 437-444 (1968).

Each of the three dissenting Justices in *Logan Valley* was careful to note that his dissent was based on the scope of the First Amendment standing alone, and not on the implementation by Congress of its constitutional powers. Thus, Mr. Justice White wrote that (391 U.S. at 340):

> If it were shown that Congress has thought it necessary to permit picketing on private property, either to further the national labor policy under the Commerce Clause or to implement and enforce the First Amendment, we would have quite a different case. But that is not the basis on which the Court proceeds, and I therefore dissent.

Similarly, Mr. Justice Harlan demurred from predicating decision on the First Amendment, and believed that decision should await a case in which the preemption question had been properly preserved, because reliance on the statutory design "would avoid interpretation of the Constitution itself, which would be required if the case were treated under the First Amendment" (391 U.S. at 333); he would eschew "a rigid constitutional rule," preferring initial decision "by Congress' chosen instrument . . ." (*id.* at 337). Finally, Mr. Justice Black emphasized that he did not "reach any issue under the National Labor Relations Act . . ." (*id.* at 329, n. 3).

See also, *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 65 (1966), in which, in requiring federal standards to be observed by state courts in adjudicating libel actions stemming from labor disputes, this Court stated that: "The [First Amendment] standards enunciated in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), are adopted by analogy, rather than under constitutional compulsion. We apply the malice test to effectuate the statutory design with respect to preemption."

II. THIS COURT'S DECISION IN LOGAN VALLEY IS THE PREMISE FOR THE INTERPRETATION OF SECTION 7, AND FOLLOWING ITS TEACHING SECTION 7 REQUIRES ACCESS BY NONEMPLOYEE UNION REPRESENTATIVES TO THE COMPANY'S OPEN PARKING LOTS TO SOLICIT UNION MEMBERSHIP.

This Court in *Logan Valley* barred as a violation of the First Amendment state exclusion of nonemployees from a shopping center to publicize the disfavored labor policy of a store by picketing and handbilling at the store within the center. *Logan Valley* provides the premise for the interpretation of Section 7 in this case. It is therefore necessary to identify its import.

In *Logan Valley* nonemployees picketed the Weis supermarket located within a shopping center with placards reading "Weis Market is Non-Union, these employees are not receiving union wages or other benefits. Amalgamated Food Employees Union Local 590." The state court barred picketing within the shopping center as a trespass on private property, and the reach of its injunction would prohibit handbilling as well. This Court held that the ban violates the First Amendment's guaranty of free speech not justifiable by the storekeeper's ownership of the private property on which the communication takes place.

The rationale of *Logan Valley* is clear. Its essence is that an employer who opens his property to the public—to customers in order to secure their patronage and to others in the community in order to operate his store—cannot close his property to peaceful picketing in the immediate vicinity of the store to publicize the store's disfavored labor policy. ". . . [P]eaceful picketing carried on in a location open generally to the public is . . . protected by the First Amendment" (391 U.S. at 313). Exclusion from the open property

"substantially hinder[s] the communication of the ideas which . . . [the union and its adherents] seek to express to the patrons of Weis" (*id.* at 323); "a prohibition against trespass on the mall operates to bar all speech within the shopping center to which [the storekeeper and the shopping center owner] object" (*ibid.*). There is no compelling countervailing interest to justify this abridgment of speech, for vindication of "[n]aked title is essentially all that is at issue" (*id.* at 324). Given the absence of any "meaningful claim to protection of a right of privacy" or "any significant claim to protection of the normal business operation" (*id.* at 324), a bare property interest cannot prevail. "Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores" (*id.* 324-325).

Logan Valley is this case. The property is as open here as it was there. Talking is as much speech as picketing. It is nevertheless claimed that it makes a difference that (1) here the Company's stores are not located within a shopping center, and that (2) here the Union sought to persuade employees to acquire union membership, rather than to dissuade customers from patronizing a nonunion store by picketing its premises. According to the Company and its *amici*, there is a compelling distinction between the parking lot of "a single free-standing retail store" and the parking lot of a shopping center (co. br. pp. 15-22; ARF br. pp. 6-11; Levitz br. pp. 2-9.). According to them, conversations with employees to persuade them to union adherence are a lesser form of speech with lesser pro-

tection than peaceful picketing designed to deter trade with a nonunion firm (co. br. pp. 12-15; ARF br. pp. 3-6; Levitz br. pp. 10-11). If these distinctions are unsound *Logan Valley* unquestionably controls. We therefore turn to their consideration.

A. The Claimed Distinction Between a Single Store Parking Lot and a Shopping Center Parking Lot.

The definition of a so-called free-standing store is that it is surrounded by a huge parking lot. If that lot cannot be penerated it would seem to create precisely that *cordon sanitaire* which *Logan Valley* denounces. We are required therefore to ask why the storekeeper who occupies a severable parcel of land may enjoy the immunity of a parking lot *cordon sanitaire* but a storekeeper who operates within a shopping center may not.

The answer is that neither has immunity. The California Supreme Court gave that answer in *In re Lane,* 71 Cal. 2d 872, 457 P. 2d 561 (1969). In reliance on this Court's teaching in *Logan Valley* and its own prior decision in *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local 31,*[11] cited approvingly in *Logan Valley* (391 U.S. at 325, n. 15), that court held that there is no distinction in principle between the opened property of a shopping center and a single store. In *Lane,* a union officer sought to distribute handbills at the doorway entrances to Calico Market urging customers not to patronize the market because it advertised in newspapers involved in a labor dispute. Owned and personally operated by a single storekeeper, Calico Market is an individual "super-market-

[11] 61 Cal. 2d 766, 394 P. 2d 921 (1964), cert. denied, 380 U.S. 906 (1965).

type" grocery store, housed in a store building which fronts on a private sidewalk some 10 feet wide and which is separated from a public sidewalk a distance of some 150-280 feet by a privately-owned parking area. The privately-owned parking area and sidewalk serve only Calico Market. The California Supreme Court answered yes to the "constitutional question" whether the union officer had a "protected right" to distribute the handbills "on the privately owned sidewalk areas owned by Calico for use by its customers as the sole means of ingress and egress to and from its store" (457 P. 2d at 563). It explained in part that (*id.* 564-565):

> If we were to hold the particular sidewalk area to be "off limits" for the exercise of First Amendment rights in effect we would be saying that by erecting a "cordon sanitaire" around its store, Calico has succeeded in immunizing itself from on-the-spot public criticism.
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> The only significant distinction between the cases cited and the instant case is the more limited purposes for which the particular sidewalk is designed to serve; here, the customers of one store, and in the other cases customers of two or more stores, or as a route of access to other places or purposes. Certainly, this sidewalk is not private in the sense of not being open to the public. The public is openly invited to use it in gaining access to the store and in leaving the premises. Thus, in our view it is a public area in which members of the public may exercise First Amendment rights.
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> * * *
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> In essence . . . when a business establishment invites the public generally to patronize its store and in doing so to traverse a sidewalk opened for access by the public, the fact of private ownership

> of the sidewalk does not operate to strip the members of the public of their rights to exercise First Amendment privileges on the sidewalk at or near the place of entry to the establishment. In utilizing the sidewalk for such purposes those seeking to exercise such rights may not do so in a manner to obstruct or unreasonably interfere with free ingress or egress to or from the premises.

The openness of the property to public entry is the only viable standard. The distances which separated the parking area entrances from the store entrances in *Logan Valley* were from 350 feet to 400-500 feet (391 U.S. at 311), in *Lana* from 150 feet to 280 feet, and in this case from 425 feet to 475 feet at the West Store and from 260 feet to 1,000 feet at the East Store (*supra,* p. 6). These differences in distance do not have constitutional or statutory dimension. The exercise of First Amendment and Section 7 rights cannot be sized by a tape measure. To attempt to delimit the locus of freedom of speech by variance in the metes and bounds of the open property would be to ensnare it in an inadministrable standard; the hostile eye would tend to fence too narrowly, the friendly eye would tend to broaden the range, and the neutral eye would not know with what lens to look. Sheer impressionism would rule. It is therefore indispensable to fix the sight, not on gradations in the size of the area, but on its openness to the public.

A single store parking lot is just as open as a shopping center parking lot. It serves "the same public function. . . . Customers, employees, supply trucks, and presumably salesmen and service people use . . . it. The public use[s] . . . it; and because of the . . . [store's] location on the outskirts of the city it obviously could not have catered to the public without

the support of the parking lot." *Priced-Less Discount Foods,* 162 NLRB 872, 874 (1967).

Furthermore, it is altogether artificial to treat the Company's stores in this case as if they stood in splendid isolation from the other establishments located in the same enclave with its stores. For example, at the West Store enclave, the Company's own parking lot is contiguous with the parking lot of the other enterprises and together form a single open uninterrupted area through which traffic flows in an unobstructed manner either from the access points nearest the Company's lot or from the access points nearest the others' lot. Cars must cross the Company's lot to reach the lot of a neighboring hamburger place. Customers parking on the Company's lot may patronize other establishments; customers parking on the others' lot may shop at the Company's store. Movement within the enclave and access to it are free, open, and unobstructed. And the enclave itself is part of a larger commercial complex when account is taken of the shopping center and other establishments which operate across the streets from it. (*Supra,* pp. 6-8.)

To a realtor the Company may nevertheless be operating "a single, free-standing store" not part of a "suburban shopping center" as defined in commercial terms (A. 210-221). But neither Congress nor the Constitution is concerned with a realtor's definitions in ascertaining whether property has been opened to public entry for free speech purposes. When the events in *Logan Valley* took place, there were but two stores in operation at that plaza. One would be hard put to say whether that two-store operation was commercially more or less significant than the business complex of which the Company is a part. But it is

certain that these "witty diversities" can have no statutory or constitutional relevance if we are to be guided by a knowable standard in determining the protected status of free speech within private but open property.

In short, the test is the openness of the property, not whether it is a part of "free-standing" store, a shopping center, or some other commercial complex. The Company's parking lots easily pass the relevant test.[12]

B. The Claimed Distinction Between Solicitation of Union Membership in This Case and Peaceful Picketing in Logan Valley.

We turn to the companion claim that conversations to persuade employees to join a union have lesser protection as speech than peaceful picketing to dissuade customers from patronizing a nonunion store. The

[12] In refusing to enjoin handbilling within a parking lot serving a restaurant and a furniture store housed in a single building, one court stated that "[t]o compare the size of the [Logan Valley] mall to the size of the parking lot or to compare the similarities or dissimilarities of the two in other physical respects doesn't seem to me to provide the correct test." *My's Restaurant* v. *Hotel, Motel, Restaurant and Bartenders Union, Local 571,* 64 CCH Lab. Cas. ¶52,461, at p. 67,892 (Wis. Cir. Ct., 1970). See also, *Lada* v. *Barbers Local No. 149,* 71 LRRM 3179 (Pa. Ct. Com. Pl., 1969), declining to distinguish between a store in a large shopping center and a small plaza.

This case presents no question concerning entry by union representatives into the store. It is the purest hyperbole to assert, as one *amicus* does, that acceptance of the criterion of "'Openness to the public' . . . would provide nonemployee union organizers with a license, absent actual interference, to solicit and distribute literature on a retail store's sales areas" (ARF br. p. 7). It has long been settled, based on avoidance of the risk of discommoding the relationship of the retail store and its customers, that the store operator is "privileged to promulgate a rule prohibiting all union solicitation within the selling areas of the store during both working and nonworking hours" (A. 33), so that not even

claim has different facets with varying emphases and we will accordingly treat each part separately. We note at the outset a puzzling implication of the Company's argument, namely, that the Union has a protected right to peacefully picket at the entrance to its store in an effort to stop its trade, but that the Union has no protected right to talk to its employees on its parking lot in an effort to institute collective bargaining by persuading a majority of the employees to designate the Union as their representative.

1. The Company objects to the equation of "solicitation by nonemployee union organizers to peaceful picketing under the First Amendment," asserting that "the right to picket" has superior status (co. br. p. 12). The Company inverts the conventional wisdom. If there is any primacy between conversations to persuade to union membership and peaceful picketing, it belongs to the oral communication. It is said that "the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication." *Hughes* v. *Superior Court*, 339

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an employee of the store may talk union within the selling areas. There is obviously a functional difference in the use to which the interior of the store and its exterior grounds are put, and therefore a valid basis for differentiating between the two based on use. In *Logan Valley*, the Court observed that the exercise of "First Amendment rights on the premises" there protected was "in a manner and for a purpose generally consonant with the use to which the property is actually put" (391 U.S. at 319-320), and it cautioned that "the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put . . ." (*id.* at 320). *Cf.*, *State* v. *Besson*, 110 N.J. Super. 528, 266 A.2d 175, 181 (1970), distinguishing between what students and teachers may not do "within the confines of the school building," from what they may do on "the sidewalks, parking lots and other 'grounds' of such institutions . . . ."

U.S. 460, 465 (1950). ". . . [T]his Court has noted that picketing involves elements of both speech and conduct, *i.e.*, patrolling, and has indicated that because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech." *Logan Valley,* 391 U.S. at 313. While we should like to believe that peaceful picketing and other modes of communication are nevertheless on a par, it is quite impossible to accord to the pure speech entailed in oral solicitation of union membership a lesser protected place than is enjoyed by peaceful picketing which inherently admixes verbal and non-verbal elements.

But, it is said, union solicitation of membership consists of "confrontation and argument (to which some employees objected)" (A. 88). There is no competent evidence of the specific context or content of any particular conversation so that the words "confrontation and argument" summarize an abstraction. As an abstraction these words define free speech. Free speech means "the opportunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins,* 323 U.S. 516, 537 (1944); see also, *Organization For A Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971). "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminello* v. *Chicago,* 337 U.S. 1, 4 (1949). ". . . [W]ords are often chosen as much for their emotive as their cognitive force." *Cohen* v. *California,* 403 U.S. 15, 26 (1971). The arguments made in this case were doubtless objectionable to the Company, and may have been unwelcome by some employees, but they

are not on that account deprived of protection. To express so-called "offensive" views is not to engage in unprotected speech, for "so long as the means are peaceful, the communication need not meet standards of acceptability." *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971). ". . . '[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise.'" *Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965).

Persuasion to union membership is thus within the inner core of free speech, and it is not removed from that protected class by calling it "solicitation" as if that word were pejorative. *Thomas* v. *Collins*, 323 U.S. 516, 536-537, 546-547 (concurrence) (1944); *Staub* v. *Baxley*, 355 U.S. 313, 321-325 (1958).

2. It is urged that what truly distinguishes this case from *Logan Valley* is the audience to which the message is addressed, the "public at large" in *Logan Valley* and the employees in this case (co. br. pp. 12-13). We pass the obvious observation that the "public at large" includes employees and that the message communicated by the picketing in *Logan Valley* was addressed as much to the employees within the store as to the customers of the store. For the Company's argument is flawed more fundamentally.

The audience is different whenever the relevant message is different. When the support of the consumer is sought the consumer is importuned. When the adherence of the employee is sought the appeal is to the employee. But each audience is identical in terms of the protected right of the speaker to address it and the hearer to receive the message. The First Amendment and Section 7 are hardly less solicitous of communication with the employee than with the customer.

But, it is urged, in *Logan Valley* the entrance to the store was an appropriate place to reach the customer by picketing and handbilling, but the parking lots in this case are not an appropriate place to reach the employee (co. br. pp. 12-13). The exterior store grounds, however, are equally appropriate as a place to disseminate information regardless of whether the means of communication are picketing, handbilling, or solicitation of union membership by talking. The parking lot is the obvious, natural, and effective place to reach the employees who work at the store to discuss unionization with them.

Thus, the parking lot is the one central place where all the employees can be met. It is there that they arrive for work and leave from work, and it is there that they may be found during breaks and at lunch (*supra,* p. 9). Some employees, indeed, eat their lunch on the parking lot (*supra,* p. 9). All are identifiable during the work day by their distinctive-colored vests and smocks (*supra,* pp. 8-9).

The foremost use of the parking lot is thus simply that it is there that the union representative can discuss unionization with the employees (A. 184, 187, 192). It is also there that appointments can be made to meet them at home or elsewhere (A. 187). And speaking to the employees on the parking lot is the essential means of obtaining their names and adddresses without which there is no way of communicating with them anywhere (A. 196-197).[13]

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[13] The Board requires that a union participating in a representation election be furnished a list of the names and addresses of eligible voters within seven days of the direction of election or approval of a consent election agreement. *Excelsior Underwear,* 156 NLRB 1236 (1966), approved *N.L.R.B.* v. *Wyman-Gordan*

Presence on the parking lot has other important uses relevant to communication. Employees are required to park their cars in designated areas of the lots (*supra*, p. 9). Observation of the cars is a significant source of relevant information. The names and addresses of employees can be learned by submitting the license numbers of their cars to the motor vehicle department (*supra*, pp. 11-12). Employee turnover can be ascertained by matching the license number or other identification of the car with the known employee who rides in it (A. 197-198). If an employee's car ceases to be on the parking lot, it is probable that he is no longer in the employ of the Company (A. 188-189). If a previously unidentified car is repetitively observed on the lot, it is probable that it is being parked there by a newly hired employee (A. 188, 198). In addition, whether a particular employee is at work or not during a particular part of the day can be determined by ascertaining whether his car is or is not parked on the lot (A. 189). If the employee's car is not there, he is a prospect for a home call where he is likely to be (A. 188, 189). If the employee's car is there, he can be met on the lot.

Finally, access to the parking lot is especially important, as here, to a new store in a suburban location. Unlike a downtown location, where employees can be

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Co., 394 U.S. 759, 767 (1969). While helpful, the list comes too late, for it is needed at the inception of a campaign and as it builds, not at its culminating stage alone. The Company notes that "the Union did not even ask Central for a list of employees' names and addresses" (co. br. p. 6), but this remark must come tongue-in-cheek from an employer who sought to stifle all discussion of unionization by both employees and representatives (*supra*, pp. 2-4, 10-11). The Union's unsurprising "experience has been that the store managers of course will not furnish us such a list" (A. 197).

met on the public sidewalks immediately adjacent to the store as they enter or leave, a suburban store customarily has no adjacent public sidewalks and the employee must therefore be met on the parking lot or not at all (A. 183-184). Furthermore, unlike an old store with some stable nucleus of long-service employees familiar with each other, a new store has a new complement of employees who are strangers to each other and who are therefore much harder to reach through in-store prounion employees (A. 184-185).

The parking lot is thus obviously an appropriate place to meet the employees to discuss unionization with them and otherwise to identify and establish contact with them in order to communicate with them elsewhere. This is virtually self-evident. As the Board observed in a previous case of a retail store parking lot (*Priced-Less Discount Foods,* 162 NLRB 872, 876 (1967)):

> Clearly the parking lot during off hours was a ready and effective place where employees could talk with the union organizer concerning organizational and union matters. It was a "natural site" for the organizer to talk with selected employees . . . . The parking lot was the logical place for him to become acquainted with and to solicit new employees. Also the parking lot was a place where he could find any specific employee at the conclusion of his shift, because every employee had to use the parking lot in some way, either to go to a car and drive away, or to await the arrival of his pick-up. Indeed there was no place where the organizer could so easily make contact with the employees, old and new.

In short, solicitation of union membership take place on the parking lot because the employees are there; they are there because that is where they work; and the

subject of discussion between the union representative and the employee is that store's unionization and the institution of collective bargaining as the means of ordering its labor relations. This is the natural habitat of communication between the union and the employees. There is no good reason why union discussion of that store's labor relations should be divorced from the locus of the work. The talk "in regard to labor conditions" on the store's parking lot "is directly related to that" store's business. "Why should . . . [the storekeeper] be permitted to avoid this incidence of carrying on business in the name of 'private property.' It is clear . . . [that he] may not, when the public activity sought to be prohibited involves constitutionally protected expression respecting . . . [his] business." Mr. Justice Douglas concurred in *Logan Valley*, 391 U.S. at 326.[14]

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[14] Accordingly, as in *Logan Valley*, so here, there is no occasion to consider the protection of communication at a privately-owned but publicly-used situs where the audience is at that place but the issue which is publicized arises elsewhere (391 U.S. at 320, n. 9, 324). We note, as stated in *Wolin* v. *Port of New York Authority*, 392 F. 2d 83, 90 (C.A. 2, 1968), cert. denied, 393 U.S. 940 (1968), that the "propriety of a place for use as a public forum does turn on the relevance of the premises to the protest, but this relation may be found in two ways. In some situations the place represents the object of protest, the seat of authority against which the protest is directed. . . . In other situations, the place is where the relevant audience may be found." In this case, the object of discussion and the relevant audience coalesce, as they must in every case of discussion at the employer's premises of the unionization of his business within the scope of activity protected by section 7. For consideration of the question reserved in *Logan Valley*, and not presented by this case, see *Tanner* v. *Lloyd Corp.*, 308 F. Supp. 128 (D. Ore., 1970), aff'd., 446 F.2d 545 (C.A. 9, 1971), cert. granted, 40 U.S.L.W. 3335 (1972); *Diamond* v. *Bland*, 3 Cal.3d 653, 477 P.2d 733 (1970), cert. denied, *sub. nom. Homart Devo. Co.* v. *Diamond*, 402 U.S. 988 (1971); *State* v. *Miller*, 280 Minn. 566, 159 N.W.2d 895 (1968). *Cf., In re Cox*, 3 Cal. 3d 205, 474 P.2d 992 (1970).

3. It is said that *Logan Valley* is different from this case because the "Weis store was the point of persuasion, the target of the 'on-the-spot' public criticism" (ARF br. p. 7). But the Company's stores in this case are just as much "the point of persuasion." It is there that the Union seeks to persuade the employees to join its ranks. And we cannot imagine why Congress or the Constitution should be solicitous of "on-the-spot" public criticism of the employer but indifferent to "on-the-spot" discussion of unionization with the employees. Nor can we imagine any discussion of unionization on the Company's parking lot which would not entail "on-the-spot" criticism of the employer.

A variant of this argument is that the *Logan Valley* parking lot "was the *only* place where patrons of Weis Market could be found," while in this case the employees are "accessible" elsewhere (co. br. pp. 12-13). This is neither accurate nor relevant.

It is inaccurate because there are no meaningful differences in the alternative means of communication available in this case and in *Lgan Valley*. As this Court observed in *Logan Valley*, the union and its adherents there were "free to canvass the neighborhood with their message about the nonunion status of Weis Market, just as they have been permitted by the state courts to picket on the berms outside the mall. Thus, . . . there is no power on . . . [the part of the storekeeper or the shopping center owner] to have . . . [the union and its adherents] totally denied access to the community for which the mall serves as a business district." 391 U.S. at 318. It was as true of the customers in *Logan Valley*, as it is of the employees in this case, that the union in either situation could try to communicate with them at the perimeter of the parking lot, or

to approach them on the streets, or to visit them at home, or to reach them through newspaper, television, or radio advertising. Thus, the alternative means of communication were no poorer in *Logan Valley* than they are here.

But these alternatives were "not determinative" in *Logan Valley* (391 U.S. at 318), and cannot be here. And for precisely the same reason. The consequence of exclusion from either the Company's or Logan Valley's parking lot is to "substantially hinder the communication of ideas" which the union and its adherents "seek to express . . . ." *Logan Valley* 391 U.S. at 323. The exclusion from either place necessarily dilutes the opportunity to reach the audience. In *Logan Valley* it was "perfectly clear that a prohibition against trespass on the mall operates to ban all speech within the shopping center to which . . . [the storekeeper and the center owner] object." 391 U.S. at 323. It is just as clear here. Diminution in the opportunity to exercise the right to free speech is inherent in exclusion from the place where the audience is. That diminution is not tolerable just because there may be other places where the communicant may still be able to find the people with whom he wants to talk. For the issue is solely whether the place from which he is excluded is itself an appropriate place to speak, and abridgment of the right to speak exists precisely because he is debarred from that appropriate place.

This is fundamental. Once it is otherwise determined that the parking lot is an appropriate place for communication, as we have shown it to be, the availability of alternative media does not strip that place of its appropriateness. "... '[O]ne is not to have the exercise of his liberty of expression in appropriate

places abridged on the plea that it may be exercised in some other place.'" *Logan Valley*, 391 U.S. at 323-324, quoting from *Schneider* v. *State*, 308 U.S. 147, 163 (1939). The contrary view is "on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations. First Amendment freedoms can no more be validly taken away by degrees than by one fell swoop." Mr. Justice Black concurring in *N.L.R.B.* v. *Fruit and Vegetable Packers*, 377 U.S. 58, 80 (1964).

4. The *amici* say that solicitation of union membership is akin to commercial activity and union organizers are mere hawkers of unwanted merchandise who may be excluded at will (ARF br. p. 4; Levitz br. p. 11). The argument at least has the virtue of baldly exposing the conflict in values which is at the root of this case.

The answer to the argument is virtually a primer in the basics of labor relations in this country. Labor unions "were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer . . . . Union was essential to give laborers opportunity to deal on equality with their employer." *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921). This judicial insight is the foundation of contemporary national labor policy. The premise of the Norris-LaGuardia Act is that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freeedom of labor . . . ." 29 U.S.C. § 102 (1964). The tenet upon which the National Labor Relations Act rests is similarly "the inequality of bargaining power between employees who do not possess full freedom of association or actual

liberty of contact, and employers who are organized in the corporate or other forms of ownership association . . . ." 29 U.S.C. § 151 (1964). To redress the imbalance Congress in Section 7 safeguarded the right of employees to self-organization and to select representatives of their own choosing for collective bargaining. "That is a fundamental right." *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937); *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 263 (1940).

Realization of that "fundamental right" requires extension of organization throughout the industry or trade of which a particular employer is a part. "To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united because, in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood." *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921); see also, *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503-504 (1940). This necessity has constitutional and statutory sanction. "'A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of all engaged in the same industry has become a commonplace.'" *American Federation of Labor* v. *Swing*, 312 U.S. 321, 326 (1941); *Logan Valley*, 391 U.S. at 314-315. Section 2 (3) of the National Labor Relations Act states that the term "employee" "shall not be limited to the employees of a particular employer," and section 2(9) of the Act defines a "labor

dispute" to mean any labor-affected controversy "regardless of whether the disputants stand in the proximate relation of employer and employee." "The broad definition of 'employee' . . . as well as the definition of 'labor dispute' . . . expressed the conviction of Congress 'that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer.'" *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 192 (1941).[15]

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[15] The centrality of this premise in the statutory scheme is reflected in this Court's repeated reversals of state court judgments as intrusions upon the field preempted by the NLRB where the state court justified prohibition of peaceful picketing on the ground of the absence of an immediate employer-employee relationship between the persons engaged in picketing and the enterprise that was picketed. *Hotel Employees Union* v. *Sax Enterprises*, 358 U.S. 270 (1959), reversing, *inter alia Fontainebleau Hotel Corp.* v. *Hotel Employees Union*, 92 So. 2d 415, 420 (1957), in which the Florida Supreme Court stated that "we hold . . . that the union as such, and as distinguished from the individual employees, may not . . . engage in picketing by use of the members of the union as pickets who are not employees of the subject employer"; *Waxman* v. *Virginia*, 371 U.S. 374 (1962), reversing 203 Va. 257, 123 S.E. 2d 381 (1962), adhering to *Dougherty* v. *Virginia*, 199 Va. 515, 100 S.E. 2d 754, 760 (1957) (The pickets "were not and never had been employees of the establishments" picketed); *McMahon* v. *Milam Mfg. Co.*, 368 U.S. 7 (1961), reversing 240 Miss. 358, 127 So. 2d 647, 651 (1961) ("In the present case, there was no employer-employee relationship between Milam and the strikers or the pickets"); *Retail Clerks International Association, Local No. 560* v. *J. J. Newberry Co.*, 352 U.S. 987 (1957), reversing 78 Idaho 85, 298 P. 2d 375, 379 (1956) ("In the present situation the Union represented none of Newberry's employees, none desired Union representation, and none of such employees took any part in the picketing of the Newberry store"); *Pocatello Building & Construction Trades Council* v. *C. H. Elle Const. Co.*, 352 U.S. 884 (1956), reversing 77 Idaho 514, 78 Idaho 1, 297 P. 2d 519, 524 (1956) ("The Union did not represent a majority, a minority, or any of Simplot's employees").

Accordingly, labor unions "may use all lawful propaganda to enlarge their membership, and especially among those whose labor at lower wages will injure their whole guild." *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209 (1921). Free speech is at the center of self-organization and the union representative is the communicant. Through him and his message the bridge is built which workers cross to join each other. He speaks to them, they to him, and together they make and strengthen their union, an act of association which is itself a protected freedom. Of course it makes no difference that the representative "in exercising these rights receives compensation for doing so," for the protected exercise of free speech and assembly is not confined to the unpaid volunteer.[16] "In the development and apposition of a trade union the paid organizer usually has the duty to widely and systematically solicit workers for membership."[17] The job that he performs in soliciting members gives practical meaning to the essential fact that labor's aspirations and actions are rightfully not confined to the immediate employer-employee relationship but cut across the entirety of the relevant industry or craft. A barrier to "solicitation of membership thus tends to smother the workers' united existance."[18]

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[16] *Thomas* v. *Collins,* 323 U.S. 516, 531 (1945); *Follett* v. *McCormick,* 321 U.S. 573, 576-578 (1944); *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 265-266 (1964); *Smith* v. *California,* 361 U.S. 147, 150 (1959); *Ginzburg* v. *United States,* 383 U.S. 463, 474 (1966); *Time* v. *Hill,* 385 U.S. 374, 396-397 (1967); *Cammarano* v. *United States,* 358 U.S. 498, 513-515 (1959) (Mr. Justice Douglas concurring); *In re Porterfield,* 28 Cal.2d 91, 168 P.2d 706, 723 (1946) ("It is of no consequence in this respect that only those who solicit for compensation are required to pay a tax.")

[17] *In re Porterfield,* 28 Cal.2d 91, 168 P.2d 706, 722 (1946).

[18] *Ibid.*

To liken solicitation of union membership to commercial profiteering, and to speak of the union representative as if he were a peddler of goods, is thus to degrade the fundamental right of self-organization and the constitutional and statutory protection which underpins it. People who want to make money do not go into the union business.

5. The Company complains that the union representatives subjected the employees to "harassment, intimidation and coercion . . ." (co. br. p. 23). This charge is devoid of evidentiary substantiation, and is not responsive to the issue even were it accurate.

Incompetent hearsay is all that is offered to support the truth of the averment. The sole competent evidence shows only that (A. 137):

> [I observed that] there were nonemployees standing on both sides of the car, on the outside, and she [the employee] was in, talking with her.

That is all. It hardly needs adding that "uncorroborated hearsay or rumor does not constitute substantial evidence." *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 230 (1938).

If a union does restrain or coerce employees, its action is of course a remediable unfair labor practice. Section 8(b)(1)(A) of the National Labor Relations Act makes it "an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7 . . ." The Company did file an unfair labor practice charge against the Union in this case but it was dismissed (co. br. p. 9). Thus the prosecutory

arm of the National Labor Relations Board found that the charge did not have sufficient merit to warrant issuance of a complaint. See, *Lewis* v. *N.L.R.B.*, 357 U.S. 10, 15-16 (1958).

But even had the charge been meritorious, it would not be relevant to justify debarment of the union representatives from the parking lot. The remedy for restraint or coercion is an order to desist from it, not suppression of protected speech by barring access to the audience. An employer who engages in repressive speech is ordered to stop coercing, not to stop speaking. The same is true of a union representative.

Finally, the Company asserts that "the decision below has now rendered the store owner powerless to control the activities of the organizers once they arrive" (co. br. p. 22). This is simply not so. The employer may of course promulgate reasonable and nondiscriminatory regulations pinpointed to specific and defined conduct whose control is necessary to the orderly operation of the parking lot and not inconsistent with the opportunity to discuss unionization on it.[19] *Logan Valley* said as much. 391 U.S. at 320-321. But the Company cannot, any more than could the storekeeper in *Logan Valley,* prohibit communication "absolutely" and jus-

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[19] "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental liberties when the end can be more narrowly achieved.' . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case." *Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175, 183-184 (1968).

tify it as "a regulation rather than a suppression" of speech. *Id.* at 321. That is this case.[20]

III. THIS COURT'S DECISION IN N.L.R.B. v. BABCOCK & WILCOX IS NOT RELEVANT TO ACCESS TO PROPERTY OPENED TO PUBLIC ENTRY, AND ITS STANDARD HAS BEEN SATISFIED IF RELEVANT.

The Company's major stress is on this Court's decision in *N.L.R.B.* v. *Babcock & Wilcox,* 351 U.S. 105 (1956). It asserts that *Babcox & Wilcox* establishes the standard which governs this case and that this standard has not been satisfied (co. br. pp. 10-15). This Court stated in *Babcock & Wilcox* that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." *Id.* at 112. We shall show that this standard is not relevant to property opened to public entry, and if relevant has been met.

1. The short and decisive distinction is that, unlike the property in this case, "the Babcock & Wilcox parking lot was not generally open to the public." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31,* 61 Cal. 2d 766, 394 P.2d 921, 926

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[20] The Company states that the Union conducted the campaign "with some 9 or 10 . . . organizers . . ." (co. br. p. 5). If this is meant to suggest that 9 or 10 organizers were simultaneously present on a parking lot at any one time, the record simply fails to support that implication. The record shows no more than two representatives present on a parking lot at any one time. A limitation upon the number of representatives who may be simultaneously present on a parking lot to prevent congestion would be a proper subject of regulation.

(1964), cert. denied, 380 U.S. 906 (1965), cited with approval in *Logan Valley,* 391 U.S. at 325, n. 15. The public use to which the opened property is put is pivotal. To prohibit communication on otherwise opened land is to hold that a "theoretical invasion" of property suffices of itself to suppress speech at the natural and effective place of its exercise. 394 P.2d at 924. The *Babcock & Wilcox* standard supports no such result.

The critical import of the public use of private but opened property is illustrated by the NLRB's early court-approved rejection of a department store's claim that it could bar nonemployee organizers from soliciting union membership on a store-owned street open to the public. *Marshall Field & Co.,* 98 NLRB 88, 93 (1952), enforced as modified, 200 F. 2d 375 (C.A. 7, 1952). A large retail department store is bisected at ground level by a street owned by the store, known as Holden Court, used by the store employees and the public to enter the building (98 NLRB at 93; 200 F. 2d at 377); "It is open to the public for pedestrian use" (98 NLRB at 93). The Court of Appeals for the Seventh Circuit enforced the NLRB's order requiring the store to permit nonemployee organizers to use Holden Court for union solicitation. The Seventh Circuit agreed that Holden Court "does partake of the nature of a city street, even though owned by the company" (200 F. 2d at 380), and its decree ordered the store to desist from "Prohibiting union organizers from soliciting on behalf of a union in petitioner's private street, known as Holden Court, where the employees involved are on non-working time" (200 F. 2d at 382).

In short, when property is opened to public entry, it loses any "meaningful claim to protection of a right of

privacy . . . ." *Logan Valley,* 391 U.S. at 324.[21] To invoke the *Babcock & Wilcox* standard in such a situation is to expand its scope, not to apply it. It is to

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[21] See also, *Fashion Fair,* 159 NLRB 1435, 1440, ¶ 1(c), 1448-1450 (1966) (parking lot serving three or four retail enterprises); *Priced-Less Discount Foods,* 162 NLRB 872, n. 1, 873-876 (1967) (single store parking lot); *Monogram Models,* 170 NLRB 636, 638-639 (1968), enforced, 420 F.2d 1263 (C.A. 7, 1970), cert. denied, 398 U.S. 929 (1970) (privately-owned shoulder of a highway used for pedestrian travel); *Solo Cup Co.,* 172 NLRB No. 110, 68 LRRM 1385, 1386 (1968), enforcement denied, 422 F.2d 1149 (C.A. 7, 1970) (industrial park); *Scott Hudgens,* 192 NLRB No. 111, 77 LRRM 1872 (1971) (shopping center). The underlying rationale was aptly articulated by an NLRB Trial Examiner in a pre-*Logan Valley* decision which the Board adopted in the absence of exceptions to it (*Arlan's Dept. Store of Charleston,* Case. No. 9-CA-3308, sl. op. p. 10, May 25, 1965):

> Respondent's parking lot . . . was open to and used by the public as well as by its employees. In fact, it was intended primarily for public use as an adjunct to the store. Having made the parking lot available to the public, Respondent may not interfere with its employees' organizational activities by unreasonably denying access to it by union organizers.

The Company relies (co. br. pp. 18-19) on the Seventh Circuit's denial of enforcement of the Board's order in *N.L.R.B.* v. *Solo Cup Co.,* 422 F.2d 1149 (C.A. 7, 1970), that court holding that the "Board's conclusion that Calumet Industrial District is a quasi-public place . . . is not supported by substantial evidence" (*id.* at 1151). The *Solo* court thus simply rejected the sufficiency of the evidence to sustain the finding, not the applicability of the principle to an adequately supported finding. In fact, the Industrial District in *Solo* consented to enforcement of the Board's order against it, and its grounds were thus opened to entry by union organizers sufficiently close to Solo's premises within the industrial park to allow effective solicitation of its employees near their place of work. *Id.* at 1150, 1151.

There is in this case no question of the sufficiency of the evidence to support the finding that the Company's parking lots are open to public entry (*supra,* pp. 5-8). The Court of Appeals held that "[t]he record, as a whole, furnishes adequate support for this finding which then binds us upon our review." (A. 84), and this Court

retreat from *Logan Valley*, not to maintain *Babcock & Wilcox*.[22]

2. A ban of speech on property opened to the public inherently implicates precisely that discrimination which the *Babcock & Wilcox* standard forbids. To permit entry to the property of every element of the public with any store-related reason for presence on the premises except that part of the community with a labor message germane to the store's operation to which the storekeeper objects is invidious. This basis of exclusion makes the exercise of free speech the point of distinction in determining what part of the public to ban from property otherwise generally open. The shopper who parks his car on the Company's lot but patronizes other establishments within the enclave is welcome (*supra*, p. 7). But the union representative who wants to speak to the store's employees present on the lot because the store is where they work is barred. "... [T]hat is to make 'private property' a sanctuary from which some members of the public may be ex-

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does not sit "to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way." *N.L.R.B.* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951).

When property has not been opened to the public, the Board applies the *Babcock & Wilcox* standard with dismayingly rigid rigor. *Monogram Models*, 192 NLRB No. 99, 77 LRRM 1913 (1971); *Falk Corp.*, 192 NLRB No. 100, 77 LRRM 1916 (1971).

[22] This Court was of course aware of *Babcock & Wilcox* when it decided *Logan Valley*. Petitioners in their brief in *Logan Valley* distinguished *Babcock & Wilcox* on the precise grounds urged here (br. pp. 34-36), as did the AFL-CIO as *amicus* (br. p. 3), and respondents in *Logan Valley* invoked *Babcock & Wilcox* precisely as the Company does in this case (br. pp. 20, 46). Other *amici* also discussed *Babcock & Wilcox* with varying emphasis depending on their interest. ARF br. pp. 12, 16; NLRB br. pp. 5, 11, 12; ACLU br. p. 7.

cluded merely because of the ideas they espouse." Mr. Justice Douglas concurring in *Logan Valley*, 391 U.S. at 326. This inherent discrimination was confirmed in this case by the specific discrimination that the Company practiced. For the Company not only barred union representatives from the parking lot, but it also wholly silenced any prounion discussion among the employees themselves at any time either inside the store or on its exterior grounds, while permitting the circulation and signing of an antiunion petition during working hours (*supra*, pp. 10-11). The basis for exclusion of union representatives was thus inherently and specifically to suppress speech. The *Babcock & Wilcox* standard bars that discrimination.

3. The Board's undisturbed finding is that "there is no reasonable means available to nonemployee representatives of the Union to reach . . . [the Company's] employees with its organizing message other than by having those representatives meet them on . . . [the Company's] parking lots" (A. 29, 68, n. 2). This finding of course precisely fits the basis for allowable entry onto the property in accordance with the *Babcock & Wilcox* standard.

We do not again rehearse the ample evidence which supports the finding (*supra*, pp. 12-14). In contrast to presence on the parking lot, the "atlernatives bear without exception the flaws of greater expense and effort, and a lower degree of effectiveness. Mailed material would be typically lost in the daily flood of printed matter which passes with little impact from mailbox to wastebasket. Television and radio appeals, where not precluded entirely by cost, would suffer from competition with the family's favorite programs and at best would not compare with personal solicitation.

Newspaper advertisements are subject to similar objections. Sidewalks and street corners are subject to the vicissitudes of climate and often force solicitation at awkward times, as when employees are hurrying to or from work." *N.L.R.B.* v. *United Aircraft Corp.*, 324 F. 2d 128, 130 (C.A. 2, 1963), cert. denied, 376 U.S. 951 (1964).[23]

The inadequacy of alternative means of communication is accented in this case by the Company's action in totally stifling prounion solicitation by the employees while countenancing antiunion activity. Unlike employees of other establishments, who may talk unionization anywhere on the employer's premises so long as they are on nonworking time, an "employer in the retail business may . . . prohibit employee solicitation in selling areas during nonworking time as such solicitation

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[23] Moreover, unions encounter difficulty in having the media accept their message for dissemination. In *Chicago Joint Board, Amalgamated Clothing Workers of America* v. *Chicago Tribune Co.*, 435 F.2d 470 (C.A. 7, 1970), each of the four general circulation newspapers in Chicago refused to accept a full page editorial advertisement submitted to them by the union showing a picket line in front of Marshall Field & Co.'s store and setting forth the union's reasons for picketing the store; in *Retail Store Employees Union, Local 880* v. *F.C.C.*, 436 F.2d 248 (C.A.D.C., 1970), radio stations in the Youngstown, Warren, and Sandusky, Ohio, area refused to sell air time to a union for one-minute spot announcements stating that a strike was in progress against a department store in that area and urging listeners to respect the picket lines; in *United Broadcasting Co. (WHKC)*, 10 FCC 515 (1945), a radio station initially refused to sell air time to a union for the purpose of soliciting members and discussing controversial issues. See, Johnson & Westen, *A Twentieth Century Soapbox: The Right To Purchase Radio and Television Time*, 57 Va. L. Rev. 574 (1971); Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 Harv. L. Rev. 768 (1972); Note, *Free Speech and the Mass Media*, 57 Va. L. Rev. 636 (1971).

could prove disruptive of the selling operation" (A. 79). Thus, retail store employees bear an impediment to self-organization with which other employees are not burdened. In this case, the Company unlawfully added to that impediment by prohibiting any solicitation by employees at any time within the store whether in selling or nonselling areas (*supra*, pp. 10-11). Furthermore, the Company compounded the wrong by permitting the circulation and signing of an antiunion petition during working time (*supra*, p. 11). The net was, as the Board observed, that the Company "precluded any union solicitation by employees on its premises, while permitting antiunion solicitation, thereby further restricting employee opportunities to be informed about organization" (A. 68, n. 2). Given the resulting "'glaring imbalance in organizational communication'" (*Montgomery Ward & Co.*, 145 NLRB 846, 849 (1964), enforced with immaterial modification, 339 F. 2d 889 (C.A. 6, 1955)), such off-premises avenues of communication as were available could not begin to redress the imbalance.

Finally, the openness of the property from which the union representatives are barred should weigh in the balance in considering the adequacy of alternative channels of communication. For, at the very least, the openness does sharply detract from any genuine claim that ownership dominion may alone exert. There is very little to balance in the owner's favor except his title, for he has by his own conduct let down the barriers, and therefore it should not take much in the way of inadequacy of alternative means of off-premises communication to outweigh the small claim he may have.

In sum, assuming the *Babcock & Wilcox* standard is relevant at all, it is fully satisfied by the Board's undisturbed and amply supported finding that "there is no reasonable means available to nonemployee representatives of the Union to reach . . . [the Company's] employees with its organizing message other than by having those representatives meet them on . . . [the Company's] parking lots" (A. 29, 68, n. 2). "Here the least that can be said for the Board's decision is that it made a choice between two fairly conflicting views . . . ." *N.L.R.B.* v. *United Insurance Co.*, 390 U.S. 254, 260 (1968). That is all that needs to be said. Courts do not sit to "displace the Board's choice between two fairly conflicting views . . ." *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488 (1951).

CONCLUSION

In the end this case reduces to the same equation that the Court resolved in *Logan Valley*. On the one side there is nothing but "[n]aked title" to property. 391 U.S. at 324. On the other side is the substantial hinderance to "the communication of ideas" resulting from exclusion from the property. *Id.* at 328. *Logan Valley* means that "the paramount and preferred place given to . . . freedom of speech in our democratic system . . . should be accorded precedence over the mere 'naked title' . . . of [a] market owner['s] . . . interest in the premises."[24] Regress from this teaching would be retreat from the First Amendment. It would be heedless of Congress' will expressed in its hospitable incorporation and protection of free speech values in section 7 of the National Labor Relations Act. Rightfully mindful of its teaching, the Court of Appeals gave

[24] *In re Lane*, 71 Cal. 2d 872, 457 P.2d 561, 565 (1969).

effect to "the mandate of *Logan Valley*" (A. 84), and its judgment should be affirmed.

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